

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

)	Case No.
)	
Petitioner,)	ORDER PERMITTING INTERIM
)	PAYMENTS AND OUTLINING
)	PROCEDURES
vs.)	
)	<u>DEATH PENALTY CASE</u>
Respondents.)	
)	

TO: Attorneys for Petitioner, [Name of Petitioner]: [Name of Counsel]
Attorney for Respondent: [Name of Counsel]

In an effort to achieve greater uniformity in the treatment of federal capital habeas corpus cases in this district and to inform counsel in advance of the Court's expectations, the Court establishes the following procedures in this case.

I. General Procedures

A. *Initial Case Management Conference.* A case management conference will be held on [date] at [time], [location], at which time the parties should be prepared to discuss any statute of limitations, or other issues, if any, which may affect the filing of the finalized petition or efficient resolution of this matter. Prior to the conference, Petitioner's counsel is expected to review the published opinion and attempt to contact counsel who represented the petitioner in any state proceedings to obtain preliminary information about the case. At the first case management conference, the parties should be prepared to discuss the time needed to assemble the entire record and a timetable for the case. The court will thereafter set dates for the filing of the Petition and Answer, and other deadlines in the case as the court may deem necessary. Counsel are instructed to familiarize themselves with the Habeas Corpus Local Rules of the U.S. District Court for the Northern District of California, available from the court and can also be downloaded from the court's website: www.cand.uscourts.gov.

B. *Assembling and Lodging the Record.* Petitioner's counsel are ordered to immediately obtain a release signed by petitioner authorizing transfer of files maintained by trial counsel to appointed counsel in this case. Petitioner's counsel should arrange for such transfer in an expeditious manner, and all state counsel are expected to cooperate in this regard. Petitioner's counsel will be expected to explain any problems encountered in arranging the file transfer at the first Case Management Conference. Respondent shall lodge the record of the state proceedings within twenty (20) days of the filing of this order.

C. *Finalized Petition and Answer.* Pursuant to 28 U.S.C. § 2244, a second or successive petition may not be filed in this Court without prior authorization from the Ninth Circuit. Under section 2244 (b)(3)(C), the grounds for obtaining such authorization are extremely limited. Consequently, it is incumbent upon petitioner to raise all known claims in the finalized petition.

The petition shall set forth the legal and factual basis for each ground for relief in a clear and concise fashion, including full citations to the appropriate portions of the record. Each factual allegation shall be separately enumerated. Additionally, the petition shall specifically state when and where each ground for relief was presented to or considered by the highest court of the state.

[Optional: Respondent will thereafter file an Answer specifically responding to each separately enumerated factual allegation.]

II. Cost Management

A. *Case Budgeting*. It is the intent of this court to work with counsel in an effort to manage the costs of capital habeas litigation. In furtherance of this objective, Petitioner's counsel are expected to prepare a budget for tasks to be performed by attorneys and paralegals and expenses to be incurred for investigators, expert witnesses and other costs. Petitioner's counsel should be prepared to provide information regarding specific personnel who will be assisting counsel in preparing this case and their respective billing rates, including associates, paralegals, investigators. After the initial case management conference, the Court will enter an order establishing the hourly rate for co-counsel, if applicable, and authorizing interim funding for investigators and paralegals. A case management plan and budget will be required for each of five phases of the case: 1) Appointment and Assembling the Record; 2) Record Review and Preliminary Investigation; 3) Preparation of the Petition, Exhaustion, consistent with this Court's guidelines, and Answer; 4) Motion for Evidentiary Hearing and Briefing of Claims Not Subject to Evidentiary Hearing; 5) Evidentiary Hearing and Final Briefing. A case management conference with the assigned judge may be held in advance of each phase. Counsel should immediately contact [NAME] , CJA Supervising Attorney, at [PHONE NUMBER] to obtain information regarding case budgeting.

At the first case management conference, the court will set a date for the filing of a Capital Habeas Case Evaluation Form and proposed budget for Phases I and II. Counsel will be expected to update and resubmit the Case Evaluation Form for each subsequent phase as the case proceeds and new information becomes available. The court will review the proposed case management plan and budget and will enter an order approving the budget in whole or in part. With regard to all budgeting matters, the court will give due regard to the confidentiality provisions of 21 U.S.C. § 848(q)(9). Any budget approved by the district judge must also be approved by the Judicial Council of the Ninth Circuit. Counsel are authorized to proceed based upon the initial budget approved by the district court and will be contacted should any further clarification, information, or action be requested by the Judicial Council.

B. *Cost-effective Use of Staff*. Petitioner's counsel are expected to use paralegals and other cost-effective means to minimize costs where attorney expertise is not required. Petitioner's counsel are not permitted to earn a profit from use of support staff. Reimbursement for independent contractors may not exceed the amount actually paid. The rates for all staff, whether on the appointed attorney's staff or independent, may not exceed district presumptive rates, unless otherwise authorized by the court. Use of associates, paralegals, law clerks, summer associates and law students must be pre-approved in connection with the budget, with specification of the hourly rate. The court expects that appointed counsel will develop a

reasonable division of labor between counsel, and between counsel and other staff, to avoid duplication of effort and excessive staff conferencing.

C. *Maintenance of Files.* Appointed counsel are expected to maintain the records and files in this case in an organized and accessible fashion to ensure that if substitution of counsel is required, duplication of efforts will be minimized. The court may condition final payment upon compliance with this requirement.

III. Submission of Vouchers

A. *Interim Payment Procedures.* Because of the expected length of this case and the anticipated hardship on counsel in undertaking representation for such a period without compensation, pursuant to paragraph 2.30B of the *Guidelines for the Administration of the Criminal Justice Act*, the following procedures for interim payments shall apply during the course of your representation: Every sixty days, petitioner's counsel shall submit an interim CJA Form 30, "Death Penalty Proceedings: Appointment of and Authority to Pay Court Appointed Counsel" to the Clerk's Office, together with an updated copy of the budget showing actual fees earned and expenditures to date. Compensation earned and reimbursable expenses incurred from the first to the last day of every prescribed billing period shall be claimed on an interim voucher submitted no later than the tenth day of the following month, or the first business day thereafter. The first voucher should be filed on or before [DATE] . No voucher need be submitted for any interim period during which compensation and expenses total less than \$750.00 and the claim for such services may be included on the voucher for the following interim period.

Compensation for in-house paralegals must be claimed as part of the attorney's out-of-court compensation. Counsel should complete a separate out-of-court worksheet for each paralegal and submit it in support of the voucher. Vouchers for paralegal services, whether provided in-house or independently, must be submitted on the same schedule as the attorney vouchers. Documentation of the services actually performed and the rate paid must be attached to the voucher, signed by the individual who performed such services.

The Court will review the interim vouchers in light of the approved budget. Variances from the budget should be pre-approved and will be authorized only for good cause.

At the conclusion of the representation, each counsel shall submit a final voucher seeking payment for representation provided during the final interim period. Counsel shall reflect all compensation or reimbursement previously received on the appropriate line of the final voucher.

B. *Supporting Documentation.* All interim vouchers shall be supported by detailed and itemized time and expense statements in the form prescribed by the Court. In addition, appointed counsel shall identify all payments previously received. Chapter VI, as well as the applicable provisions of Chapter II, Part C of the *Guidelines for the Administration of the Criminal Justice Act*, and the *CJA Panel Attorney Manual for the United States District Court, Northern District of California* outline the procedures and rules for claims by CJA attorneys and should be followed regarding each voucher.

1. *Timekeeping.* Petitioner's appointed counsel are expected to maintain accurate time records; such records are subject to audit and must be maintained for a period of three years after approval of the final voucher for an appointment. Time records must be in a format approved by the Court. Unless otherwise approved, hours billed must be divided in tenths of an

hour. Each time entry shall reflect discrete individual tasks and shall not simply list multiple tasks performed in a specified block of time. Information should be provided in sufficient detail as to permit meaningful review, without violation of the canons of ethics or disclosure of attorney work product, including but not limited to: specification by identifying information of witnesses interviewed;¹ identification of persons involved in telephone conversations or conferences and topic discussed;² specific topics researched; identification of documents reviewed or prepared, including transcripts and pleadings drafted or reviewed, by title and page numbers; and, if necessary for an understanding of the task, explanation of its relevance to the federal proceedings. Aggregate time blocks or entries which are vague or ambiguous will not be approved for payment. If the level of detail is insufficient for auditing purposes, the vouchers will be returned to counsel for resubmission with adequate detail.

2. *Noncompensable Services.* Compensation will not be approved for the following:

a. Administrative, clerical, secretarial, or word processing services, regardless of whether the person performing the function is an attorney, law clerk, paralegal or secretary.

b. Expenses related to the testimony of a fact witness, either at trial or deposition, including service of subpoenas, transportation and other expenses, are not reimbursable under the Criminal Justice Act, but rather are governed by Rule 17, Federal Rules of Criminal Procedure and 28 U.S.C. § 1825. Appointed counsel are advised to contact the local U.S. Marshal's Office for assistance.

c. **[Optional: Work performed which is exclusively related to exhaustion in state court.]**

d. Tasks related to appeals (whether from interlocutory orders or final judgments) or other work related to the review of proceedings before this Court. Counsel are to seek compensation for work done at the appellate level from the Court of Appeals after having obtained an appointment as counsel of record from that court.

e. Discovery is not permitted without prior authorization by the Court.

IV. Funding for Ancillary Services

A petitioner in a capital habeas corpus case may be entitled to funding for investigative, expert, and other services reasonably necessary for the representation of the petitioner. 21 U.S.C. § 48(q)(9). Pursuant to paragraph 6.03D of the *Guidelines for the Administration of the Criminal Justice Act*, all experts and investigators authorized by this Court to provide services during the course of the proceedings in this case, whether authorized prior or subsequent to the issuance of this order, shall be permitted to file vouchers on an interim basis. The following presumptive rates have been approved by the U.S. District Court for the Northern District of California: paralegals/law clerks shall be paid at a rate not to exceed \$35.00 per hour or those paralegals/law clerks with special skills at a rate not to exceed \$45.00 per hour; investigators will be paid at a rate not to exceed \$55.00 per hour, or those investigators with special skills at a rate not to exceed \$65.00 per hour.

1. If counsel feels it is inappropriate to provide the name of a witness, identification by type of witness (e.g. "guilt phase witness #1") is sufficient. The court requires sufficient information to distinguish between individuals interviewed.

2. A simple description of the general topic of discussion, not specific details, is requested.

Counsel is immediately authorized to assemble and review the record and to prepare budget documents. At the first case management conference, the court will authorize funds for attorney time, paralegals and other services to accomplish such tasks, which will be applied to the budget for the initial phase. In order to obtain additional funding, petitioner's counsel will be expected to explain and document expenditures to date, and must obtain prior approval from the Court for funding for investigators, experts, and other such service providers for additional expenditures in excess of \$300.00. An order approving petitioner's budget shall constitute such prior approval.

Upon approval of budget items for investigative services, experts or other services, counsel is responsible for communicating with the service provider to ensure that services comply with specific terms of the court order and do not exceed the amount authorized. Service providers will not be paid in excess of amounts authorized.

All voucher submissions for fees and expenses of investigators, experts and other service providers must be made on a CJA Form 31, "Death Penalty Proceedings: Ex Parte Request for Authorization and Voucher for Expert and Other Services." All submissions must include a copy of the approved budget order authorizing employment of the person whose services are being billed and an itemized statement of the expert's time and expenses in a similar format to that required of appointed counsel. All approved experts and service providers are permitted to submit bills on an interim basis. Travel expenses of experts must follow the procedures for court-appointed counsel as set forth in paragraphs V (A) & (B), *infra*.

V. Reimbursable Expenses

Counsel may be reimbursed for out-of-pocket expenses reasonably incurred incident to the representation. With respect to travel outside of the district for the purpose of consulting with the client or his/her former counsel, interviewing witnesses, etc., travel expenses such as air fare, mileage, parking fees, meals and lodging, can be claimed as itemized expenses. Proof of payment shall be submitted for any individual expense more than \$50.00 by an original paid receipt, copy of the canceled check, or credit card receipt.

The following additional guidelines may be helpful to counsel:

A. Case-related travel by privately owned automobile should be claimed at the current government authorized rate, plus parking fees, ferry fares, and bridge, road and tunnel tolls. Transportation other than by privately owned automobile should be claimed on an actual expense basis.

B. Actual expenses incurred for meals and lodging while traveling outside of the district in the course of the representation must conform to the prevailing rates placed upon travel and subsistence expenses of federal judiciary employees in accordance with existing government travel regulations. All overnight travel must have been approved in conjunction with the case budget or funding request; otherwise advance judicial approval must be sought. Appointed attorneys and experts must take advantage of government travel rates through the government authorized travel service when most economical. Air travel in First Class is prohibited.

C. Telephone toll calls, photocopying, and photographs are reimbursable expenses if reasonably incurred. However, general office overhead, such as rent, secretarial help, telephone service, publications, supplies, and costs related to educational seminars, or time expended for

preparation of vouchers are not reimbursable expenses; nor are expenditures for personal items for the client.

D. Photocopying will be reimbursed up to a maximum of \$.10 per page for in-house copying. Large copy orders should be reproduced by an outside copy service unless in-house photocopying is more economically efficient.

E. Reimbursement is permitted for the actual cost of case-related regular U.S. postage. Counsel are to make every effort to use regular U.S. mail whenever possible. Reimbursement for the actual cost of messenger, courier or other postal services or for the use of priority delivery services (such as overnight or two-day delivery) will be permitted only if there is a genuine need for such a service. A copy of an itemized bill is required for reimbursement of such expenses. Fax transmissions are reimbursable for the actual amount of the telephone charge.

F. In the event that transcripts are required, counsel should arrange with the court reporter(s) to bill the court directly through use of a CJA Form 24. Counsel shall not include the cost of transcripts as an out-of-pocket expense on a CJA Form 30.

VI. Further Questions or Guidance

Answers to questions concerning appointment under the Criminal Justice Act can generally be found in: (1) 18 U.S.C. § 3006A; (2) the Criminal Justice Act Plan of the United States District Court for the Northern District of California (General Order 2) and General Order 50, available through the Clerk's Office; (3) the Criminal Justice Act Panel Attorney Manual for the United States District Court, Northern District of California, available through the Clerk's Office, CJA Section and on the court's website, www.cand.uscourts.gov; and (4) the *Guidelines for the Administration of the Criminal Justice Act*, published by the Administrative Office of the United States Courts, also available through the Clerk's Office-CJA Voucher Section. Should these references fail to provide the desired clarification or direction, counsel should address their inquiries to the Clerk's Office-CJA Voucher Section.

IT IS SO ORDERED.

Dated: _____

United States District Judge